

34276

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

In Re: Tax Assessment Against
Purple Turtle, LLC, Joseph Atkins
and Dana Grabiner, Mary A. Melnyk,
Linda Lloyd, Ryan McCarthy and
Erica B. Patthoff, David Springer and
Judith Leitner Springer, Joseph L.
McNamara and Donna B. McNamara,
Gwenda A. Glesman and Paul R. Scribner,
William W. Donahoe and Wendy Jones
Donahoe, Kenneth R. Reitzig and Elizabeth
D. Reitzig,

Civil Action No. 06-C-198
Honorable David H. Sanders

Petitioners/Appellants,

v.

Preston Gooden,

Assessor of Berkeley County, West Virginia,

Respondent/Appellee.

FILED: *March 20 2008*
Gregory
CLERK CIRCUIT COURT

ORDER GRANTING SUMMARY JUDGMENT TO APPELLANTS

This matter comes on for consideration this 28th day of November, 2007

upon the record before this Court and upon the Appellants' Motion for Summary Judgment and the response and reply thereto, if any. After considering all the evidence, this Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Appellants filed an appeal of the decision by the Berkeley County Commission sitting as a Board of Equalization and Review affirming the 2006 assessments of sixteen lots belonging to the Appellants on March 24, 2006.
2. The Appellants submitted an appeal of the 2007 assessments on March 22, 2007.
3. The Appellants have consistently argued that the assessed value of their lots is far greater than the true, "fair market value" of those lots.

4. There are sixteen (16) parcels at issue and these parcels were subdivided from a tract known for tax purposes as Tax Map 19, Parcel 8 in the Gerrardstown Tax District
5. The entire tract consisted of approximately three hundred twenty (320) acres.
6. For the year 2005, the total assessed value on the entire three hundred twenty (320) acre parcel was Forty Thousand Nine Hundred and 00/100 Dollars (\$40,900.00) or One Hundred Twenty-Eight and 00/100 Dollars (\$128.00) per acre. Taxes payable on that land were Two Hundred Ninety-One and 64/100 Dollars (\$291.64) or Zero and 91/100 Dollars (\$0.91) per acre.
7. After the sixteen individual one-acre lots were broken out for development, the tax assessment changed dramatically. In 2006, the proposed assessed value on the sixteen (16) lots was Three Million Seventy-Two Thousand and 00/100 Dollars (\$3,072,000.00) or One Hundred Ninety-Two Thousand and 00/100 Dollars (\$192,000.00) per acre. The total estimated 2006 taxes on these parcels have increased to Forty-Four Thousand Three Hundred Fifty-Two and 00/100 Dollars (\$44,352.00) or Two Thousand Seven Hundred Seventy-Two and 00/100 Dollars (\$2,772.00) per acre, an increase in excess of three hundred thousand percent (300,000%).
8. Appraisals and taxes for the 2007 year are comparable to those for 2006.
9. As to the sixteen approximately one-acre lots, the appraisal value of the lots was calculated by the Assessor to be \$192,000.00 each.
10. According to a letter from the Berkeley County Assessor's Office dated February 16, 2006, the 1 acre lots were appraised "based on the average sale price of \$192,000.00 and the remaining 304 acres are valued at a reduced farm agricultural price per acre."
11. The letter notes the concern of the Appellants that the appraisals of the one acre lots reflect a 300,000 % increase in market value, observing that in 2005, all the acreage was valued with

farm rates at \$40,900.00 and that in 2006, the remaining farmland was valued at \$41,000.00 but the Assessor argues that there was no increase in the market value "because the lots created a new neighborhood for the 2006 tax year."

12. The Assessor's letter argued that "[b]ecause of its uniqueness, Broom Grass (sic) does not compare to other subdivisions, so we appraised them (the lots) at the market they created."

13. In their appeal to the Commission, the Appellants provided an appraisal by an independent appraiser, The Hawthorne Group, that had been performed in April, 2005 when the Berkeley County Farmland Protection Board sought an appraisal of the land that was then the subject of a possible conservation easement as well as an affidavit by an independent appraiser asserting the value of the lots at issue was \$40,000 each..

14. The appraisal by the independent appraiser recognized the difference in value between the 16 buildable lots and the land that was to be made subject to a conservation easement; the appraisal of the 16 lots at issue used six sales of similar properties in the immediate area in the Gerrardstown District that had been sold in late 2004 and early 2005 as a basis of comparison.

15. The sizes of the lots used by the independant appraiser for comparison purposes ranged from 1.62 to 2.5 acres. The unit prices for those lots ranged from \$29,787.00 to \$45,000.00 per acre and the unadjusted mean value per acre for the six sales was \$39,304.00 per acre. Based on those six sales, the appraisal estimated the value of each of the 16 lots at issue to be approximately \$40,000.00 per lot.

16. Similar, though larger, lots immediately adjacent to the Broomgrass Subdivision were appraised by the Assessor at lower prices.

17. The lots adjacent to those in Broomgrass are similar; they have similar topography,

are located in the same approximate area and in the same general district and the opportunities and advantages of the surrounding area are the same. *Id.*

CONCLUSIONS OF LAW

1. Summary judgment is appropriate if there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Thus, the Court must conduct "the threshold inquiry of determining whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.*

2. The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). That is, once the movant has met its burden to show absence of material fact, the party opposing summary judgment must then come forward with affidavits or other evidence demonstrating there is indeed a genuine issue for trial. Fed.R.Civ.P. 56(c); *Celotex*, 477 U.S. at 323- 25, 106 S.Ct. 2548; *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249, 106 S.Ct. 2505 (citations omitted).

3. Article 10, section 1 of the West Virginia Constitution provides that "... taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained and directed by law."

4. West Virginia Code § 11-3-1 holds that “[a]ll property shall be assessed as of the first day of July at its ‘true and actual value’; that is to say, at the price for which such property would sell if voluntarily offered for sale by the owners thereof, upon such terms as such property, the value of which is sought to be ascertained, is usually sold, and not the price which might be realized if such property were sold at a forced sale. . . .”

5. “[T]he term ‘value,’ as used in article 10, section 1 of the West Virginia Constitution, means the ‘worth of money’ of a piece of property - its market value.” See *In re 1975 Tax Assessments Against Oneida Coal Co.*, 178 W.Va. 485, 487-88, 360 S.E.2d 562-563 (1987), quoting syllabus point 3 of *Killen v. Logan County Commission*, 170 W.Va. 602, 295 S.E.2d 689 (1982).

6. “True and actual value” means fair market value: what property would sell for if sold on the open market. *Eastern American Energy Corp. v. Thorn*, 189 W.Va. 75, 78, 428 S.E.2d 56, 59 (1993), citing *Kline v. McCloud*, 174 W.Va. 369, 372, 326 S.E.2d 715, 718 (1984).

7. “Determining ‘true and actual value’ is the first step in taxing real property.” *Kline*, 174 W.Va. at 372.

8. The Assessor improperly used the average price paid per lot, \$192,000.00, as the only gauge of the “true and actual” or “fair market” value of all of the lots.

9. West Virginia’s Supreme Court has warned that the “price paid for property is not conclusive as to value. . . .” See *Crouch v. County Court of Wyoming County*, 116 W.Va. 476, 477, 181 S.E. 819, 819 (1935).

10. “In determining the fair market value of a piece of land, a county assessor must ‘seek out all information which would enable him to properly fulfill his legal obligation.’” *Kline*, 174 W.Va. at 372, quoting *In Re Shonk Land Co.*, 157 W.Va. 757, 761, 204 S.E.2d 68, 70 (1974).

11. West Virginia law allows county assessors to consult a number of credible and reliable sources of information when assessing a piece of property. They can, for instance, consult a property owner's sworn valuation or an appraisal by a bona fide appraiser," in determining the assessed value of property. *Kline*, 174 W.Va. at 372, citing *Killen v. Logan County Comm'n*, 295 S.E.2d 689, 706 (1982).

12. The assessment process developed by the legislature to ensure fair assessments "contemplates a democratic method of assessment in which each property owner is an active participant." See *Rose v. Fewell*, 170 W.Va. 447, 449, 294 S.E.2d 434, 436 (1982).

13. Although the West Virginia Supreme Court has stated that assessors should seek out all information that will allow them to properly fulfill their legal obligations and that they can make use of an appraisal by a bona fide appraiser in determining the assessed value of property, the Assessor chose to ignore the independent appraisal and try to insulate himself from any questioning by relying on his assertion that the lots were "unique."

14. If an assessor is going to classify property as "unique," and thereby forego the safeguards that computer comparison programs are meant to provide to ensure that property is fairly compared and assessed, then he or she has an obligation to seek out additional information to ensure that the fair market value of that property is determined and that the property is taxed in proportion to "its" actual value. See Article 10, section 1 of the West Virginia Constitution.

15. In *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336, 409 S.Ct. 633, 102 L.Ed.2d 688 (1989), assessment inequalities of only 8-35% between comparable properties were deemed problematic; disparities of more than 100% between the assessed

values of the 16 lots and the assessed value of similar properties signify an unacceptable overvaluation of Appellants' property.

16. In *State v. Allen*, 65 W.Va. 335, 64 S.E. 140 (1909), the sole syllabus point stated that "[t]he state is not entitled to double taxes on the same land under the same title." Property should not be subject to double taxation -- and taxing real property based on its purchase price, when the purchase price clearly includes money devoted to the purchase, preservation and/or improvement of other, separately taxed property, allows the state to improperly collect double taxes and improperly requires the landowner who has paid greater than fair market value for his property to pay more than his or her fair share of property taxes.

17. Even if the Broomgrass lots are "unique," the question the Assessor is required to answer is what their true and actual value is. West Virginia Code § 11-3-1.

18. The Assessor has an obligation, in determining the fair market value of the property, to "seek out all information which would enable him to properly fulfill his legal obligation. "*Kline*, 174 W.Va at 372, quoting *In Re Shank Land Co.*, 157 W.Va. 757, 761 204 S.E.2d 68, 71 (1974).

19. The Assessor had an obligation to weigh information provided to him that suggested that the property's appraisal value was far less than the sales price.

20. There is no evidence that the Assessor has actually refuted the independent appraisal or done anything more than rely on his own judgment that the property is "unique" to tax it at exorbitant rates.

21. The Assessor acted inappropriately and has not properly arrived at the "fair market value" of the property at issue and Appellants are entitled to summary judgment.

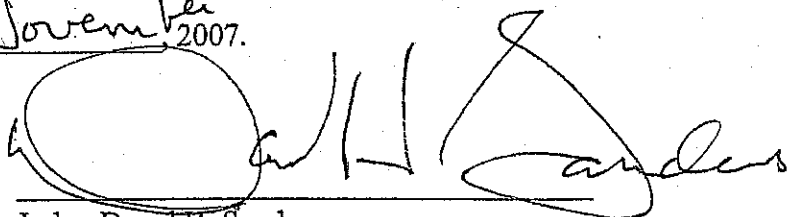
22. The fair market value appraisal value of the lots at issue is \$40,000.00 each.

23. Appellants are entitled to have the properties reassessed for the 2006 and 2007 tax years based on the \$40,000 appraisal value.

24. Appellants are entitled to a refund of the taxes paid in excess of the correct assessments on such properties and, if taxes have not yet been paid for 2007, Appellants are entitled to pay only the corrected tax bills.

WHEREFORE, based upon the foregoing, it is hereby ORDERED that the Appellants' Motion for Summary Judgment be GRANTED.

ENTERED this 28th day of November 2007.

A handwritten signature in black ink, appearing to read "David H. Sanders", is written over a horizontal line.

Judge David H. Sanders
Circuit Court of Berkeley County

A TRUE COPY
ATTEST

Virginia M. Sine
Clerk Circuit Court

By: Laura L. Cooper
Deputy Clerk